SUMMARY of COOPERATIVE CASES

UNITED STATES DEPARTMENT OF AGRICULTURE
FARMER COOPERATIVE SERVICE

LEGAL SERIES NO. 7 DECEMBER 1958

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FARMER COOPERATIVE SERVICE
WASHINGTON, D.C.

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The comments on cases reviewed herein represent the personal opinion of the author and not necessarily the official views of the Department of Agriculture.

SPECIAL NOTICE

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ANTITRUST LAW - AGRICULTURAL COOPERATIVE HELD EXEMPT FROM MONOPOLIZATION BAN OF SECTION 2 OF SHERMAN ACT, BUT SUBJECT TO SECTION 7 OF THE CLAYTON ACT and TO HAVE VIOLATED THAT ACT.

(United States v. Maryland & Virginia Milk Producers Association, Inc. U.S.D.C. for D.C., Civil No.4482-56 October 16 and November 21, 1958).

In two oral decisions during the proceedings in this case, U. S. District Judge Alexander Holtzoff held: first, that the defendant is an agricultural cooperative association "entitled to the benefits of both the Clayton and the Capper-Volstead Acts and the exemptions and immunities conferred by those two statutes"; second, that because of these statutes the Government could not sue the association for an alleged monopolization or attempt to monopolize in violation of section 2 of the Sherman Act; third, that an alleged conspiracy with certain persons not engaged in agricultural pursuits in violation of sections 1 and 3 of the Sherman Act stated a cause of action within the exception of the Borden case (U. S. v. Borden, 308 U. S. 188); fourth, that the cooperative is subject to section 7 of the Clayton Act relating to corporate mergers and acquisitions; fifth, that the evidence sustained a finding that the cooperative, in acquiring Embassy Dairy, violated section 7 of the Clayton Act since the effect of the acquisition was to substantially lessen competition mainly between the Association and other producer-suppliers of milk on the Washington market; and sixth, that a similar acquisition of another concern which was in a failing condition did not constitute a violation of the section.

This case was a civil action brought by the United States against the Maryland & Virginia Milk Producers Association, Incorporated, (hereafter called "the Association") under the antitrust laws, for injunctive and similar relief.

The court summarized the complaint as follows: "While the complaint, which related to the milk industry in the Washington Metropolitan area, is not technically divided into separate counts, it in effect sets forth three separate claims for relief or causes of action.

"The first cause of action charges an attempt to monopolize interstate trade and commerce in supplying milk for resale as fluid milk in the Washington Metropolitan area, comprising the District

of Columbia and nearby regions of Maryland and Virginia. This cause of action is based on Section 2 of the Sherman Act, 15 United States Code, Section 2.

"The second cause of action charges a combination and conspiracy to eliminate and foreclose the competition above-mentioned by making and carrying out a contract for the transfer to the defendant of substantially all of the assets of a concern known as Embassy Dairy, Incorporated, which is a retail outlet for milk in the area. This cause of action is predicated on Sections 1 and 3 of the Sherman Act, 15 United States Code, Sections 1 and 3.

"The third cause of action charges that the defendant on July 26, 1954, acquired substantially all of the assets of Embassy Dairy, Incorporated, and that the effects of this acquisition have been or may be substantially to lessen competition or to tend to create a monopoly in the production and sale of milk to dealers in the Washington Metropolitan area. This cause of action further charges that, with the same effect, the defendant on December 6, 1957, purchased and acquired all of the outstanding capital stock of Richfield Dairy Corporation and Simpson Brothers, Incorporated, which operated the Wakefield Dairy. This cause of action is founded on Section 7 of the Clayton Act, 15 United States Code, Section 18. The pertinent provision of that Section is found in Paragraph First, and reads as follows:

> 'No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital, and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where, in any line of commerce, in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.'"

Among the defenses pleaded by the Association was one that under section 6 of the Clayton Act (15 U.S.C.17) and the Capper-Volstead Act (7 U.S.C. 291) it was immune from the provisions of the anti-trust laws in respect to the activities of which the Government complained. A further defense was that the Secretary of Agriculture has primary jurisdiction of one of the activities concerning which complaint was made. The court ordered a separate trial of these

defenses and, at the conclusion of this trial entered his first opinion.

In this first opinion he reviewed the statutes in question and concluded that the Association was an agricultural cooperative entitled to the benefits of both laws. In reaching this conclusion, the court rejected the Government's argument that the existence of corporate members and other members who conducted their dairy operations entirely through employees or who did not receive the major portion of their income from farming was sufficient to deprive the Association of the benefits of these acts. The court said: "It is urged by the government that the words 'dairymen' and 'farmers' should be restricted to natural persons who personally work on dairy farms and who derive the major portion of their income from the farms.

"The Court sees no basis for such a restricted definition. The owner or operator of a dairy is a dairyman, whether he personally works on his dairy or has the work done by employees. So, too, the owner of a farm may be regarded as a farmer even though he devotes the major portion of his activities to other pursuits.

"When Congress desired to put a more circumscribe definition on the term 'farmer' it did so expressly, as is true of the Bankruptcy Act.

"The Court, therefore, is of the opinion that it is immaterial whether every member of the association personally works on his farm or whether every member of the association is a natural person or a corporation."

The Court then proceeded to consider whether these exemption provisions were sufficiently broad to cover the activities of which the Government complained. The court said, in part:". . . in effect the Capper-Volstead Act adds nothing to the immunities and exemptions of the Clayton Act except to extend them to corporations having capital stock and except to make the provisions of the earlier statute more definite and specific.

"How far the exemptions and immunities of the two statutes extend is a question of novel impression. Although the Clayton Act was enacted as far back as 1914 and the Capper-Volstead Act as far back as 1922, this question has not been definitely determined and is still open. Perhaps this circumstance is due to the fact that

but few attempts have been made to prosecute agricultural co-operatives.

* * *

"At the outset, it must be noted that the Clayton Act exempts from the anti-trust laws the existence and operation of such organizations. It is not limited to their existence but includes both existence and operation.

"Moreover, the last clause of the Clayton Act provides that such organizations or members thereof shall not be held or construed to be illegal combinations or conspiracies in restraint of trade. If that clause stood alone, we would be confronted with a different situation. But it is quite apparent that the Congress, in enacting the Clayton Act, covered both the existence of such organizations as well as their activities and operations and exempted both from the anti-trust laws.

"The same result is reached by an examination of the Capper-Volstead Act, which authorizes persons engaged in the production of agricultural products to act together in associations and authorizes associations and their members to make necessary contracts and agreements to effect their purposes.

"Obviously, the Capper-Volstead Act is not limited to granting immunity to such associations in respect solely to their existence but extends likewise to their activities."

The court noted that support for this conclusion is also derived from the reports of Congressional Committees, such as H. Rept. 627, 63rd Cong. 2nd Sess., pp. 36, 38; and S. Rept. 698, 63rd Cong. 2nd Sess.

The court then continued: "The government argues that the exemption and immunity from anti-trust laws conferred upon agricultural cooperatives should be deemed to extend to certain types of restraints but not to others.

"To say that it should extend only to reasonable restraints would be fallacious because no legislation was necessary to permit reasonable restraints of trade. They are not banned under the anti-trust acts. Consequently, if any restraints are immune from the anti-trust acts as a result of the legislation we are considering, they must be unreasonable restraints of trade.

"The government argues, however, apparently, that some unreasonable restraints, mild in character perhaps, should be permitted, whereas those that are more reprehensible and perhaps predatory should not be deemed exempt or immune under either the Clayton Act or the Capper-Volstead Act.

"There is no basis in the statutes, however, for separating unreasonable restraints that would otherwise come within the provisions of the anti-trust acts into two categories and conclude that some come within the exemption and others do not. To reach any such conclusion would be for this Court to legislate by amending an act of Congress. This the Court cannot do because the Congress itself has not done it.

"There are indeed well-recognized limitations on the immunities and exemptions granted by the legislation. The exemptions are accorded and immunities are conferred on agricultural cooperatives and their activities. When they step outside of their field and conspire with persons who are not producers of agricultural products, they are beyond the scope of the exemption. This was held by the Supreme Court in United States versus Borden Company, 308 U.S. 188, 204, which was followed by the Court of Appeals for this Circuit in United States versus Maryland and Virginia Milk Producers Association, 85 Appeals D. C. 180, 182, where it was pointed out that a combination of producers and distributors, the latter not being within the terms of the statutes, is not privileged.

* * * * * * *

"The government relies on the cases of Local 36 of International Fishermen versus United States, 177 Fed. 2d 320, 332, and Gulf Shrimpers and Oyster Association versus United States, 236 Fed. 2d 658, 664-5. Each of these cases, however, is distinguishable. The former involved a combination of fishermen and dealers and, therefore, a combination within the ban of the Borden case. The latter presented a situation in which the association did not act as agency for its members but sales were made directly by members to dealers.

"It must be mentioned in passing, of course, that the exemptions and immunities extend only to provisions of the anti-trust acts. They do not confer any right to violate any other statute, criminal or civil.

"Also, it must be borne in mind that the exemptions and immunities relate solely to activities in connection with agricultural products. If an organization such as the defendant should step outside

of that field and carry on business in products of a different nature, then the provisions of the Clayton and Capper-Volstead Acts would not apply.

"But, subject to these exceptions, the Court is of the opinion that an agricultural cooperative is entirely exempt from the provisions of the anti-trust laws, both as to its very existence and as to all of its activities, provided it does not enter into conspiracies or combinations with persons who are not producers of agricultural commodities.

"The public does have another remedy against what would otherwise constitute violations of the anti-trust laws, Section 2 of the Capper-Volstead Act describes a procedure whereby the Secretary of Agriculture may institute administrative proceedings and seek enforcement of his orders in the courts if he finds that such an association monopolizes or restrains trade in inter-state or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced.

" Obviously, this remedy is applicable in only a limited group of cases and the public is not protected against restraints of other kinds.

"Moreover, an agricultural cooperative is apparently not subject to suit by a private person, as is the case with other persons whose activities come in conflict with the anti-trust laws.

"Thus, it would seem that under the law as it now stands, an agricultural cooperative may monopolize articles of food and unreasonably restrain commerce in such commodities and the public receives no protection from the anti-trust laws except in a very limited way.

* * * *

"The Court, therefore, reaches the conclusion that the government has no cause of action under Section 2 of the Sherman Act, and, therefore, the first cause of action alleged in the complaint will be dismissed on the merits.

"This brings us to the second and third causes of action, which relate to the acquisition of the assets of Embassy Dairy as well as the stock of the Richfield Dairy Corporation and of Simpson Brothers, Incorporated.

"The second cause of action alleges a violation of Sections 1 and 3 of the Sherman Act. It charges a conspiracy with certain persons who are not engaged in agricultural pursuits as defined in the statutes. These allegations are clearly within the exception of the Borden case and, therefore, a cause of action is stated in respect to these activities.

"The third cause of action relates to the aquisition of the assets of Embassy Dairy and capital stock of Richfield Dairy Corporation and Simpson Brothers, Incorporated, and charges violations of Section 7 of the Clayton Act, 15 U.S.Code 18, the pertinent portions of which have already been quoted.

"In brief, the statutory provision here involved prohibits any corporation engaged in inter-state commerce to acquire the whole or any part of the capital stock of any other corporation likewise engaged in inter-state or foreign commerce, and further prohibits any corporation subject to the jurisdiction of the Federal Trade Commission to acquire the whole or any part of the assets of another corporation engaged in interstate or foreign commerce if the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly.

"The defendant claims that this provision is not applicable to it because the Capper-Volstead Act empowers it to make the necessary contracts and agreements to effect its purposes.

"The Court does not agree with this contention. It is a well-known principle of law that repeal by implication shall not be favored, and unless there is a clear repugnancy between the earlier and the later statute the two statutes shall be so construed as to give effect to both.

"It is the opinion of the Court that the provisions of Section 7 of the Clayton Act, 15 U.S. Code 18, constitute a limitation on the authority of an agricultural cooperative to make contracts as authorized by the Capper-Volstead Act.

"The Court has no doubt that the defendant corporation is subject to the jurisdiction of the Federal Trade Commission and, therefore, within the terms of Section 7 of the Clayton Act, 15 U.S.Code 45.

"The Court, therefore, reaches the conclusion that the second and third causes of action averred in the complaint are valid."

Following the entry of the foregoing opinion, the case proceeded to trial on the issue which the court designated above as "Count 3". At the conclusion of this portion of the trial, the second opinion was entered. The court, after reviewing the proceedings to date, made the following observations with respect to section 7 of the Clayton Act: "Section 7 of the Clayton Act, which has been heretofore quoted, as originally enacted was limited to acquisitions of capital stock. By an amendment enacted on December 29, 1950, the Act was extended so as to cover acquisition of assets as well. In addition, the amendment generally broadened the phraseology of the statute. In 1950 it became sufficiently comprehensive and inclusive in its terms so as to bring under its ban both horizontal and vertical acquisitions, either of capital stock or of assets of other concerns.

" . . . by a 'horizontal acquisition' is meant the acquisition or control of one competitor by another; while the word 'vertical' is applied to an acquisition or control by a concern in one echelon of a concern in another echelon in the same line of trade or commerce, such as a transaction between manufacturer and a jobber or between a wholesaler and a retailer or between a manufacturer or dealer and a customer.

"The statute was construed recently by the Supreme Court in United States versus E. I. duPont de Nemours & Company, 353 United States 586. The facts of that case are unique. In 1917 duPont & Company acquired a considerable block of stock of General Motors Corporation. Obviously, the two corporations were not competitors and were not engaged in the same line of business. DuPont and Company, however, were selling certain commodities, such as fabrics, that were used in the manufacture of automobiles. Among the customers for these products was General Motors Corporation. The latter purchased some of these products from duPont and some from other manufacturers and dealers.

"In 1949 the government brought a civil suit attacking the stock acquisition on the ground that it violated Section 7 of the Clayton Act in that it tended to lessen competition between duPont and other dealers in similar products, all of whom were selling or endeavoring to sell their goods to General Motors Corporation.

"The Court held that the transaction violated Section 7 of the Clayton Act.

"In discussing the construction to be accorded to the statute, the Court held that it was immaterial whether actual restraints or monopolies in fact resulted from a merger or an absorption condemned by the Clayton Act or in fact whether there was actually a substantial lessening of competition.

"The Court went even further and held that it was immaterial whether a substantial lessening of competition was intended.

"The test formulated by the Supreme Court in the duPont case was whether there was a reasonable probability that a substantial lessening of competition or a monopoly might result from the acquisition by one corporation of the capital stock or the assets of another corporation.

"On this point the Court said, at page 589:

> 'The Section is violated whether or not actual restraints or monopolies or the substantial lessening of competition have occurred or are intended.'

"In order to be within the ban of the statute, it is, of course necessary that there be reasonable probability of a lessening of competition or the creation of a monopoly within an area of effective competition. The market affected must be substantial and it must appear that competition may be foreclosed in a substantial share of that market.

"The Court expressly held that the Act applies both to horizontal and to vertical acquisitions.

"So, too, the Court also indicated that the fact that all concerned acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company, and without any design to over-reach anyone, does not defeat the right of the Government to relief.

"Finally, the Court held, for the purpose of the case before it, that the test was whether at the time of the institution of the suit, and not necessarily at the time of the acquisition of the capital stock or assets, there was reasonable probability that the transaction was likely to result in the condemned restraints."

The Court pointed out that one of the issues in the duPont case - namely the 30-year lapse of time between the acquisition and the institution of suit - "does not concern us in the instant case" since this acquisition, completed in July 1954, was promptly challenged by complaint filed on November 21, 1956, and "the government contends that the challenged transaction was illegal as of its date, as well as of a subsequent time . . . "

The Court then reviewed the evidence in the case. He found that the Washington Metropolitan area, consisting of the District of Columbia and nearby Maryland and Virginia, constituted a separate market for the retail distribution of milk, and the effect of the acquisition had to be gauged by the consequences in that market. While the Government was not required to show motive, he held that evidence on this point was admissable to help show what actually occurred. In this connection, he reviewed a number of statements by the Association's officers as to what they sought to accomplish. This material, in summary, showed an intent to eliminate a disturbing influence in the local market, broaden the Association's class 1 sales, and eliminate from the Washington market, cheap "distress" milk from other markets.

The Court then said: "The evidence indicates that the price paid by the Association for the transfer was far in excess of the actual and intrinsic value of the property purchased.

"To be sure, the rosy prospects previously depicted did not materialize and the optimistic expectations of those in control of the Association were not fully realized. Nevertheless, they were at least partially attained.

"Apparently the continued existence of several comparatively small dairies kept alive considerable competition in the industry.

"After the absorption of Embassy by the defendant, the latter undertook the retail business previously conducted by Embassy, in addition to continuing the functions of the Association as a wholesaler.

"Many of the independent producers who supplied Embassy were unable to find an outlet for their product in the Washington market unless they were willing to surrender their independent status

and join the Association. Some of them, indeed, pursued the latter course, thereby augmenting the defendant's membership. A large proportion of them, however, began to ship to a Baltimore dealer.

"Thus, one result of the transaction was that a portion of the fluid milk supply was diverted from the Washington to the Baltimore market, while another consequence was an increase in the amount of milk coming to the defendant's hands.

"A still further sequel of the transaction was the elimination of the largest single outlet in the Washington Metropolitan area for milk produced by independent dealers. Immediately after the Embassy acquisition 91.7 per cent of the milk purchased by the federal government originated directly or indirectly from the defendant, as against 45 per cent that it had indirectly supplied previously. The Embassy Dairy was eliminated completly as a factor from this competitive business.

"Thus, the result of the acquisition of Embassy by defendant tended to lessen competition in the milk industry in the Washington market in more ways than one. It diminished competition for the purchase of milk from producers by eliminating one large independent purchaser; it reduced competition for sales to government establishments by excluding a rival that had been in the habit of cutting prices and under-bidding Association members; it tended to create a monoply by concentrating a larger proportion of the milk supply reaching the Washington area in the hands of the defendant, thereby augmenting the defendant's control, or, at least, influence on the market.

"It must, indeed, be observed that defendant did not achieve complete monopoly, for several comparatively small independent dealers still stayed in the market and even prospered. The law, however, is not aimed only at complete monopolies or directed solely at entire elimination of all competition. It is sufficient if the acquisition, merger, or absorption tends to lessen competition or tends to create a monopoly.

* * * *

"It is argued by able counsel for the defendant that the acquisition of Embassy by the defendant did not reduce the number of dealers in the market but merely resulted in the substitution

of another dealer for the one who had been eliminated, in that the business previously conducted by Embassy was taken over and continued to be operated by the defendant, in addition to the defendant's business as a wholesale distributor.

"Ingenious as this line of reasoning is, it does not solve the problem. The transaction constituted much more than the replacement of one dealer by another. It was the absorption of the business of the largest independent dealer by the biggest wholesaler in the area and combining the affairs of the two concerns into a single operation, thereby augmenting the influence of the latter in the market and getting rid of a troublesome rival.

"So too, it is no answer to say that milk prices in the area did not climb to a higher level subsequent to the transaction. Prices are affected and influenced by numerous imponderable factors. It is within the realm of possibility that prices might have fallen were it not for the acquisition of Embassy by the Association. The subject of price fluctuations is a topic concerning which the Court cannot speculate.

"As an affirmative defense the defendant invokes the last paragraph of Section 7 of the Clayton Act, which reads as follows:

> 'Nothing contained in this Section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under Section 79 of this Title, the United States Maritime Commission or the Secretary of Agriculture, under any statutory provision vesting such power in such Commission, Secretary, or Board.'

"Stripping this provision of those portions that are not material to the issues in the case at bar, the pertinent language is reduced to the following:

> 'Nothing contained in this Section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Agriculture under any statutory provision vesting such power in such Secretary.'

"In support of this defense, defendant introduced evidence to the effect that it applied to a government financial institution known

as the Baltimore Bank for Cooperatives for a loan to enable it to carry out the purchase of the Embassy assets and that after scrutinizing the merits of the proposed transaction the Bank made the loan requested by the defendant.

"The defendant further introduced evidence to the effect that the Marketing Division of the Farmer Cooperative Service of the Department of Agriculture looked into the desirability of the transaction and expressed a favorable opinion.

"This evidence does not sustain the defense. For two reasons:

First, the statute above quoted exempts only such transactions as are consummated pursuant to authority given by the Secretary of Agriculture 'under any statutory provision vesting such power in such Secretary.' Admittedly, however, there is no statutory provision empowering the Secretary of Agriculture to approve any transaction such as is involved here.

Second, the transaction was not authorized either by the Secretary of Agriculture or by anyone acting in his behalf.

"The acts and statements of government officials on which the defendant relies are not sufficient to constitute statutory sanction. Even if they should be deemed to be such representations as might form a basis for an estoppel as between private individuals, this circumstance cannot aid the defendant. It is elementary law that the government cannot be estopped by statements or acts of any of its officers or agents.

"Authorities supporting this principle and applying it are legion. Suffice it to cite two old decisions of the Supreme Court from which later authorities are derived and on which they are based: The Floyd Acceptances, 7 Wallace 666, 676, and Wisconsin Central Railroad Company versus United States, 164 U.S. 190, 210.

"The Court, therefore, concludes that the acquisition of the assets of Embassy Dairy, Incorporated, by the defendant constituted a violation of Section 7 of the Clayton Act and that, consequently, judgment should be rendered compelling the defendant to divest itself of these assets and cancelling all contracts ancillary to the transaction.

"A different problem arises in connection with the acquisition of the capital stock of the Richfield-Wakefield Dairies. There are two corporations involved, one known as Richfield, the other Wakefield.

"At the time in question, the Richfield Corporation was out of business, but owned and controlled the stock of Wakefield Corporation, or, rather, Simpson Brothers, Incorporated, which operated the Wakefield Dairy.

"The evidence establishes without contradiction that at the time the capital stock of these two corporations was purchased by the defendant the two companies were hopelessly insolvent and were deeply in debt. The defendant was a very large creditor, for an amount exceeding $300,000 for unpaid milk bills. The Wakefield Dairy was on the brink of bankruptcy.

"The acquisition of capital stock or assets of a failing corporation is not within the ban of Section 7 of the Clayton Act. While the statute does not expressly so provide, this conclusion is inherent in the statutory provision because the acquisition of a failing corporation that is on the brink of going out of business cannot result in lessening competition or in creating a monopoly.

". . . the Supreme Court so held in International Shoe Company versus Federal Trade Commission, 280 U.S. 234, 298.

"The Court concludes, therefore, that the acquisition of the capital stock of the Richfield Dairy Company and Simpson Brothers, Incorporated, was not violative of Section 7 of the Clayton Act."

Decision as to whether the so-called "second count" should be tried was deferred until the Government could have an opportunity to consider its position in the matter. Counsel were directed to submit a proposed judgment under which the Association would be required to divest itself of the assets acquired from Embassy Dairy, Incorporated.

ANTITURST LAW - CAPPER-VOLSTEAD ACT DOES NOT GIVE AGRICULTURAL COOPERATIVE IMMUNITY FROM TREBLE-DAMAGE SUIT FOR VIOLATION OF MONOPOLIZATION BAN IN SECTION 2 of SHERMAN ACT.

(April v. National Cranberry Association, Civil No.56-567-A, U.S.D.C. Mass. 11/20/58)

This is a treble-damage action under section 4 of the Clayton Act (15 U.S.C. 15), against National Cranberry Association (hereafter called "the Association"), two of its corporate members, and a number of their officers. The action is based on alleged violations of sections 1 and 2 of the Sherman Act (15 U.S.C. 1, 2). The defendants moved for summary judgment on the ground that they were "wholly immune from suit" under the Capper-Volstead Act, since no conspiracy with outsiders was alleged.

Although the opinion of Judge Holtzoff, reported immediately above, was urged on the court, Judge Aldrich did not accept it entirely. Instead, he held "that when Capper-Volstead provided that a cooperative and its members were not to be prohibited from 'lawfully carrying out the legitimate objects thereof . . .' (to use the language of section 6 of the Clayton Act), at least it did not make lawful purely predatory practices seeking to monopolize, forbidden to an individual corporation, nor did it deprive the victims of such practices effected with monopolizing intent of their private right of action under section 4 of the Clayton Act."

Accordingly, he denied the summary motion although reserving the question as to whether "the action should go to trial on the present complaint ..."

He noted that Judge Holtzoff's conclusion followed, apparently, from his statement, in response to argument made to him by the Government that Capper-Volstead permitted only reasonable restraints, that "no legislation was necessary to permit reasonable restraints of trade." He then said: "That statement, or the implications attached to it, overlooks something of importance.

"The Sherman Act has two aspects. As summarized in the Report of the Atorney General's National Committee to Study the Antitrust Laws (1955), at p. 30,

> 'Section 1 of the Sherman Act, unlike Section 2, requires a plurality of actors for its violation. It does not proscribe restraints of trade, as such, but only 'every contract, combination in the form of trust or otherwise, and conspiracy in restraint of trade.' In marked contrast Section 2 may be violated by a single person who 'monopolizes' trade. In addition, however, Section 2 makes it a separate violation to 'combine or conspire with any other person or persons, to monopolize' trade.'

"Thus, a single business enterprise may set for itself wholly unreasonable prices without violating section 1. However, any fixing of prices by the agreement of two or more persons violates this section even though the prices fixed are entirely reasonable. United States v. Trenton Potteries Co., 273 U.S. 392. It is clear that if individual agriculturalists, through the medium of a cooperative, jointly fixed prices, reasonably or otherwise, without statutory authorization, they would be subject to prosecution. The Capper-Volstead Act was passed to permit such joint action in order to remedy the economic weaknesses of 'independent' farmers as compared with business and industry. In the House report on the bill, it was said, in part,

> 'While this bill confers on farmers certain privileges, it cannot properly be said to be class legislation. Business corporations have under existing law all the powers and privileges sought to be conferred on farm organizations by this bill. Instead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to the ordinary business corporations so the farmers can take advantage of it.' H. Rep. No. 24, 67 Cong., 1st Sess. 2 (1921).

"Consequently, I think it insufficient to say that no legislation was needed to permit reasonable restraint of trade by a cooperative, and to draw unlimited conclusions therefrom. The inquiry must go deeper. On the other hand, it is hardly adequate simply to say, as plaintiffs do here, that Judge Holtzoff's decision was wrong.

"The minimum effect of the act was to equate an agricultural cooperative and its members with an individual business entity, as a lawful unit. The members could not he held for unlawful 'combination' or 'conspiracy,' any more than could the officers of a single corporation, at least where the combination is an element of the substantive offense. Nelson Radio & Supply Co. v. Motorola, Inc., 5 Cir., 200 F. 2d 911, 914, cert. den., 345 U.S. 925; Marion County Co-op Ass'n. v. Carnation Co., D. C. W.D. Ark., 114 F. Supp. 58, 61-62, aff'd., 8 Cir., 214 F. 2d 557. This conclusion in substance disposes of section 1 of the Sherman Act.

"Did Capper-Volstead go further, and provide that cooperatives and their members would not be liable for conduct forbidden to even an ordinary business entity? There is nothing in section 1 of Capper-Volstead referring to monopolization, or attempts thereat. The subject was frequently discussed, however, particularly during the debate in the Senate, where an amendment dealing with this question was reported out by the Committee on the Judiciary, S. Rep. No. 236, 67 Cong., 1st Sess. (1921) (set out at 62 Cong. Rec. 2120-21 (1922)). This amendment would have substituted for the present section 2, 7 U.S.C.A. §292, a provision explicitly making applicable to the cooperatives all laws prohibiting monopolization. It was rejected by the Senate, 62 Cong. Rec. 2281 (1922), but I do not draw from this the conclusions that all acts of monopoly were automatically approved. Some light is cast by the debate subsequent to the filing of this amendment, in which a number of points were made: 1. That farmers would usually be prevented by the workings of economic laws from achieving a monopoly. 2. That the possibility of a monopoly in a few specialized instances should not be permitted to outweigh the general benefits of the act. 3. That if agriculturalists could be prosecuted for monopolization, every local United States Attorney would be on their trail. 4. That the harm resulting from a monopoly would be to the public, through enhancement of prices. No mention is to be found of injury which would result to competitors of a cooperative if it engaged in predatory practices against them for the purpose of achieving a monopoly. With these announced considerations in mind, Congress passed section 2 of the act, 7 U.S.C.A. §292, which commences:

> 'If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural

product is unduly enhanced by reason thereof, he shall serve upon such association a complaint. . .'

"This section goes on to provide that the Secretary, after hearing, may issue a cease and desist order, and that if that is disregarded proceedings shall be had in the district court, which may issue an injunction, and enter such decree as it deems 'equitable.'

"It is thus clear that the statement in the Maryland and Virginia Milk case that 'an agricultural cooperative is entirely exempt from the provisions of the antitrust laws . . . as to all of its activities. . . ' must mean less than it says. I believe considerably less."

The Judge pointed to a portion of the House report which states that if the associations "do anything forbidden by the Sherman Act, they will be subject to the penalties imposed by that law," and cited passages from the debate which also emphasized this concept.. He continued: "There was, of course, the difference that the government proceedings could be initiated by the Secretary of Agriculture pursuant to Section 2. It is also possible to infer that such proceedings were intended to be the exclusive governmental remedy, within limits which need not be here determined. See United States v. Borden Co., supra, at 205-06. But even if the government were so limited it would be another thing to infer that private suits could not be brought at all. Particularly I can think of no purpose to be served by permitting cooperatives to use unfair methods to put competitors out of business. To permit this would award agricultural cooperatives a very substantial 'privilege or special favor,' contrary to the bill's announced purpose and the disclaimers of its sponsors."

PRODUCTION CREDIT ASSOCIATION RESERVE FOR BAD DEBTS HELD REASONABLE: COMMISSIONER'S DISALLOWANCE VOIDED.

(Mitchell-Huron Production Credit Association (and others) v. Welsh, U.S.D.C., S.D., 1958, 163 F. Supp. 883).

In this case, actions by a number of production credit associations against the Internal Revenue Service to recover taxes paid on the difference between the reserves set up for bad debts, and the amounts allowed by the Commissioner were consolidated for trial purposes. The court held that where each association, in the business of making loans to farmers for agricultural purposes, set up a five percent reserve for bad debts upon recommendations from the Production Credit Corporation, which, under the statute carried the force of a statutory mandate, and such reserve was also supported by evidence of sound business practice, the association acted within the prescribed statutory limitation of "reasonable" and was entitled to take such amount as a deduction in computing income taxes.

The eight associations consolidated in the suit were organized under the Farm Credit Act of 1933; their function being to make loans to farmers for agricultural purposes. These suits arose out of differences between the total amounts claimed by plaintiffs as reserve for bad debts for the years 1951, 1952, 1953, and 1954, and the amounts allowed by the Commissioner of Internal Revenue. The plaintiffs paid the tax on those differences after tax deficiency assessments had been made and then sought refunds amounting to $108,428.00, plus interest.

The statutes and Treasury regulations involved, insofar as they are material in connection with this case, were as follows:

> Internal Revenue Code of 1939, Sec. 23 (as amended by Sec. 113(a) Rev. Act of 1943, c. 63, 58, Stat. 21);
>
> Farm Credit Act of 1933, c. 98, 48 Stat. 257; and
>
> Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939.

These statutes and regulations gave the associations the right to "deduct from gross income a reasonable addition to reserve for bad debts." The court emphasized that the associations were

required to add the amounts they did, and more, under directions from the Production Credit Corporation of Omaha, then a statutory supervisor of the associations' affairs. He held, however, that aside from this, there was evidence warranting the action of the plaintiffs in policies of a 5% reserve for bad debts adhered to by other lending agencies, experience of others suffering losses in depression periods following periods of higher prosperity levels, and other evidence giving rise to an inference that, as they acted, they gave consideration to all relevant facts bearing on the problems they were required to solve.

The court said: "The evidentiary phase, underlying the action of the plaintiffs as they made additions to reserve for bad debts, based, as the court finds, on delegated statutory authority, on weight of acts performed in obedience to recommendations or orders or mandates from a federal supervising agency and on evidence as to conditions and circumstances which necessarily enter into such a security against losses problem, impresses this court as honest, prudent, wise and determined efforts by their managers to provide against uncertainties which, because of violent ups and downs in the price structure, insects, and elements obtain in the agricultural financing field." He cited with approval the case of Rhode Island Hospital Trust Company v. Commissioner of Internal Revenue, 1 Cir., 1928, 29 F. 2d 339, 342, in which the court found that the Commissioner, having made deductions from gross income substantially lower than those of the plaintiffs, had abused his discretion. He also quoted from the case of Winter Garden Production Credit. Ass'n. v. Phinney, D.C., 139 F. Supp, 213, 216, as being a "virtually identical" case "in complete harmony" with the views expressed in this case. Other cases cited were United States v. Beckman, 3 Cir., 104 F. 2d 260, 262, and The First National Bank of Omaha v. Commissioner, 8 Cir., 49 F.2d 70, 72.

The court held that each of the plaintiffs was entitled to recover the amount which heretofore had been paid, with interest as claimed, in these cases. It is understood that the Government will not appeal the decision.

MISSOURI TRUCKER HELD EXEMPT FROM STATE REGULATION WHEN HAULING MILK FOR AN AGRICULTURAL COOPERATIVE.

(State of Missouri, ex rel. Smithco Transport Co. v. Public Service Commission of the State of Missouri, et al. 316 SW. 2d 6, Mo. 1958).

The essential point considered by the court in this case was whether the transportation of milk and dairy products for a cooperative from its Lebanon plant to the St. Louis market was within the exemptions from a certificate of convenience and necessity contained in the State statutes regulating public carriers. A general provision in the State's cooperative marketing act (section 274.300, RS Mo. 1949, V.A.M.S.) extends "any exemption whatever under any and all existing laws applying to agricultural products in the possession or under the control of the individual producer . . . similarly and completely" to such products delivered by farmers to a cooperative and under its possession and control. The court held that this provision had the effect of exempting trucks used in transporting milk for a farmers' cooperative from regulation by the Public Services Commission in view of the exemption accorded "farm or dairy products" in section 390.030, RS Mo. 149, V.A.M.S. (numbered 390,031 in V.A.M.S.).

Sanitary Milk Producers is a farmers' cooperative having a membership of more than 5,000 in the States of Illinois and Missouri. It has a plant at Lebanon where it received milk in large quantities. Smithco Transportation Company, by contract with Sanitary Milk Producers, transported the milk in large tanks to St. Louis markets. The records showed that Smithco hauled exclusively for Sanitary; all tanks and equipment being kept at Sanitary's plant and ever ready for use at a moment's notice.

Smithco began hauling for Sanitary in 1955 and thereafter Smithco's trucks were frequently stopped on their way to market because they did not have a State certificate of convenience and necessity. Smithco was threatened with prosecution. Finally, Smithco applied to the court for a writ of prohibition to enjoin the prosecution. This request was denied. Smithco then filed an application with the Public Service Commission for a permit to haul milk and other dairy products. The Commission denied this request, and the denial was sustained by the Circuit Court of Cole County. Smithco then appealed, contending that the

Commission had no jurisdiction for the reason that its hauling of milk and dairy products was exempt by virtue of the statutes.

One of the protestants argued that Smithco was estopped from questioning the Commission's jurisdiction because of the fact that it had filed an application with the Commission. The Court of Appeals ruled, however, that the question of jurisdiction was a live issue in the case on appeal. It then proceeded to rule as is indicated above.

A motion for rehearing was also denied. In discussing this motion, the court rejected a contention that the association was not entitled to the exemption because it did not obtain all its milk from farmer members. The court pointed out that the Public Service Commission's ruling would have denied exemption even when all milk was so obtained. Furthermore, it said the record showed that the association did obtain all its milk from farmer members.

Finally the court pointed out that Smithco was not a common carrier; that if a cooperative contracts with a common carrier that would not relieve the common carrier from regulation, including rate fixing; but that if Smithco is considered a contract carrier, Section 390.061 Cum. Supp. RS Mo. 1957 is not deemed applicable because of the agricultural exemption previously noted.

INTEGRATED FEED DEALERS HELD QUALIFIED AS PRODUCER PATRONS OF COOPERATIVE

(Rev. Rul. 58-483; I.R.B. 1958-40, p. 40)

"Where a feed dealer furnished poultry to a grower and the grower agrees to properly feed and care for the poultry and to turn it over to the dealer for marketing through a farmers' cooperative association, both the feed dealer and the grower are patrons of the cooperative association and they qualify as producers for purposes of section 521 of the Internal Revenue Code of 1954 to the extent of their respective interests in the poultry marketed. Such course of dealing will not of itself affect the cooperative association's status as an organization exempt from Federal income taxation under section 521 of the Code provided that its activities otherwise conform to the requirements for exemption specified in that section."

"Advice has been requested whether a farmers' cooperative association, by marketing poultry supplied by feed dealers in the circumstances described below, will thereby affect its status as an organization exempt from Federal income taxation under section 521 of the Internal Revenue Code of 1954.

"The cooperative association was incorporated for the purpose of processing and marketing poultry for members and other producers on a cooperative basis. It deals with all patrons on the same basis with respect to charges for services and payment of patronage dividends. It markets a considerable amount of poultry for feed dealers which is raised by poultry growers (farmers) in the area.

"Pursuant to written or oral contract, the feed dealers furnish poultry to growers. The growers agree to properly feed and care for the poultry so supplied. The feed dealers also supply the growers with all fuel, feeds, medicines, and other necessary supplies, the cost of which is deducted from the price received from the sale of the poultry. After deduction of the cost of the supplies, the net profit from the poultry sales is divided between the feed dealers and the growers.

"Although the feed dealers, rather than the growers, normally enter into the marketing agreements with the cooperative association concerning poultry grown in the instant circumstances, all patronage dividends with respect thereto, with the dealers' consents, are credited to the account of the growers involved. Since the dealers generally give such consent and since the cooperative association's bylaws provide that any patron who has accumulated sufficient credits of patronage dividends to pay for a share of common stock may become a member, most of the growers are members of such cooperative association. Furthermore, most of the feed dealers are also members thereof.

"Section 521 of the Code provides, in part, for the exemption from Federal income taxation of farmers', fruit growers' or like associations organized and operated on a cooperative basis for the purpose of marketing the products of members or other producers and turning back to them the proceeds of sales, less the necessary selling expenses, on the basis of either the quantity or the value of the products furnished by them.

"In determining whether the cooperative association is fulfilling the requirements specified in section 521 of the Code so that it may maintain its exemption, it is necessary to ascertain

whether the feed dealers qualify as producers and patrons to the extent of their interest in the poultry marketed in the situation referred to and whether the growers so qualify.

"Under the terms of the contracts between the feed dealers and the growers, it appears that the parties are tenants in common with respect to the poultry involved, so that each has an undivided interest in such poultry subject to his control. Compare Underhill v. Allis-Chalmers Mfg. Co. 15 Fed. (2d) 181; Minneapolis Iron Store Company v. William Branum, 162 N.W. 543; Dickey v. Waldo, 56 N.W. 608. Since each grower has a property right in such poultry, each feed dealer, in marketing it, acts as agent for the grower to the extent of the grower's interest therein. Accordingly, it is clear that to the extent of the grower's interest in the poultry marketed, he is a producer for purposes of section 521 of the Code and a patron of the cooperative association. It is equally clear that each feed dealer is a patron in his own right as to his interest in the poultry which he markets and that the feed dealer is a producer for purposes of the cited Code section. Compare Farmers Co-operative Creamery v. Commissioner, 21 B.T.A. 265, nonacquiscence published in C.B.X-2, 86 (1931), withdrawn for the year 1925 and acquiescence substituted therefor for that year only. C.B.1947-2,4.

"Accordingly, it is concluded that the feed dealers in question qualify as producers and patrons of the instant cooperative to the extent of their interest in the poultry marketed through the cooperative. Therefore, it is held that the marketing of poultry for the feed dealers will not effect the cooperative's exempt status, provided it continues to meet the requirements for exemption prescribed by section 521 of the Internal Revenue Code of 1954."

FINAL REGULATIONS ISSUED ON AMORTIZATION OF GRAIN STORAGE FACILITIES.

On August 27, 1958, the Internal Revenue Service published (23 F.R. 6622) in final form the regulations on amortization of grain storage facilities under section 169 of the Internal Revenue Code of 1954. These regulations are set forth in T.D. 6305 and were also published in Internal Revenue Bulletin 1958-37, at page 16 et seq.

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